

Advisory Opinion

IECDB AO 2010-09

Subject: Engaging or Retaining a Campaign Advertising Firm/Consultant

Nicole Schlenger
President
Capitol Resources, Inc.
PO Box 257
Brooklyn, Iowa 52211

Dear Ms. Schlenger:

This opinion is in response to your email letter of August 10, 2010, requesting an opinion from the Iowa Ethics and Campaign Disclosure Board pursuant to Iowa Code section 68B.32A(12) and Board rule 351—1.2. We note at the outset that the Board's jurisdiction is limited to the application of Iowa Code chapters 68A and 68B, Iowa Code section 8.7, and rules in Iowa Administrative Code chapter 351. Advice in a Board opinion, if followed, constitutes a defense to a subsequent complaint based on the same facts and circumstances.

FACTUAL STATEMENT:

You advise us that Capitol Resources is a firm that provides several election related services to a variety of clients and that it currently employs 39 individuals to perform these services. Some of your clients would like you to assist in independent expenditure activities and other candidates or committees that would benefit from the independent expenditure.

You further advise us that newly enacted Iowa Code section 68A.404(7) and the Board's accompanying rule in 351—4.53(4) prohibit a person who makes an independent expenditure from engaging or retaining an "advertising firm or consultant that has also been engaged or retained within the prior six months by the candidate, candidate's committee, or ballot issue committee that is benefited by the independent expenditure."

You are concerned that this limitation abridges the First Amendment and you cite court decisions and a Federal Election Commission regulation to that effect. You also propose establishing a "firewall" and other procedural safeguards that you state will protect your client's First Amendment rights yet also promote the government's interest in prohibiting "coordination" between a committee and an independent expenditure activity.

QUESTIONS:

Based on this factual scenario you present us with the following questions:

1. May employees who provide advice to candidates and committees be “firewalled” from those that provide similar services to persons engaging in independent expenditure activities?
2. May employees carrying out essentially ministerial functions and who are not involved in the development or targeting of such advertising work for the both a candidate a person engaging in independent expenditure activity?
3. May employees provide consulting services to candidates and committees and to persons engaging in independent expenditure activities so long as Capitol Resources develops and implements a policy that prohibits the use of information obtained from one client that is material to the develop of plans for another?

OPINION:

We first note that under the rules of statutory construction in Iowa Code chapter 4, statutes are presumed to be enacted in compliance with both the Constitutions of Iowa and of the United States. In addition, the cases and FEC regulation you cite do not mandate a particular determination in this opinion. However, the Board is also very cognizant that over the last 36 years no other area of government regulation has had as much litigation at both the national and state level as campaign finance.

Iowa Code section 68A.404 was amended by 2010 Iowa Acts, Senate File 2354, by adding new subsection (7) that contains the following prohibition:

“A person making an independent expenditure shall not engage or retain an advertising firm or consultant that has also been engaged or retained within the prior six months by the candidate, candidate’s committee, or ballot issue committee that is benefited by the independent expenditure.”

The purpose of prohibiting “coordination” is to ensure that independent expenditures are truly “independent” and are not simply vehicles for campaign committees to avoid other campaign finance prohibitions and limitations. If a campaign and an independent expenditure effort has engaged or retained the same advertising firm or consultant it is more likely that communications were coordinated rather than truly independent expenditures.

The issue of “firewalling” is an accepted concept and practice in the business world. It is also a standard that the Board implements when administering the post state employment restrictions in Iowa Code chapter 68B and the Board’s rules on executive branch ethics in 351—Chapter 6.

In IECDB Advisory Opinion 2010-01, the Board opined that “engaged or retained” in Iowa Code section 68A.404(7) applied only to situations when “specific and individual advice, guidance, instruction, or consultation” was provided to a customer.

Turning to your questions, we believe that it would be permissible for an advertising firm or consultant to be “engaged or retained” by both a campaign committee and an independent expenditure organization if the employees who were providing the “specific and individual advice, guidance, instruction, or consultation” were appropriately “firewalled.” Similarly, so long as the ministerial functions did not rise to the level of providing “specific and individual advice, guidance, instruction, or consultation” we do not believe that an individual employee performing such ministerial functions would be impermissibly “engaged or retained.” Finally, an internal policy that prohibits the use of information obtained from one client that is material to the development of plans for another client would certainly promote the purposes of Iowa Code section 68A.404(7) and the determinations in this opinion.

While it is not mandated, it would assist the Board in the regulatory process if Capitol Resources would willingly file with the Board its plan for both “firewalling” employees and the internal policy that would be implemented and developed that would prohibit the use of information obtained from one client that would be material to the development of plans of another client.

BY DIRECTION AND VOTE OF THE BOARD

James Albert, Board Chair
Gerald Sullivan
John Walsh
Patricia Harper
Saima Zafar
Carole Tillotson

Submitted by: W. Charles Smithson, Board Legal Counsel